

MEMORANDUM OF LAW

DATE: August 18, 1993

TO: Kent Lewis, Assistant Personnel Director

FROM: City Attorney

SUBJECT: Americans with Disabilities Act

BACKGROUND

Recently, several City departments have been inquiring into the requirements of the Americans with Disabilities Act ("ADA") and the effect those requirements will have on the operational aspects of the departments, especially in the police and fire services. There is a particular concern about the mandates concerning the phrases "qualified individual with a disability" and "essential function." These concerns have prompted you to request a legal opinion as to what the legal requirements of these phrases imply, and particularly, whether "essential functions" may be determined on a class-wide basis, or whether it must be done on a case by case basis.

The ADA, 42 U.S.C. sections 12111 et seq., was adopted by Congress and signed into law on July 26, 1990. The effective date of Title I of the ADA dealing with employment was July 26, 1992. Because the law is so new, little case law is available to interpret the provisions of the ADA. The only published case under the ADA, *U.S. Equal Employment Opportunity Commission v. AIC Security Investigation, Ltd.*, 820 F. Supp. 1060, 1064 (1993), was decided in the employee's favor on March 18, 1993. In its opinion the court noted that:

Although the ADA is relatively new law, Section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. Section 794 and many state handicap laws form the basis of parallel decision which will assist with questions of law in this action. In fact, the ADA expressly contemplates that the voluminous precedent arising out of Section 504 of the Rehabilitation Act may serve as

guidance for determinations involving the ADA. See, 42 U.S.C. Section 12117(b).

U.S. Equal Employment Opportunity Commission, 820 F. Supp. at 1064.

Therefore, this memorandum will apply Rehabilitation Act cases by analogy.

Like the ADA, the Rehabilitation Act focuses on the key phrases "qualified person with a disability" and "essential function." The Equal Employment Opportunity Commission ("EEOC") has adopted regulations to aid in implementation of ADA mandates. The ADA regulations provide "this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973." Rules and Regulations, 56 Fed. Reg. 35734 (1991). This regulation indicates that all conclusions reached by the courts concerning definitions and interpretations of the language of the Rehabilitation Act ("Act") would be equally applicable to similar provisions of the ADA.

ANALYSIS

Qualified Individual With A Disability

The first issue is to determine which factors make an applicant a "qualified individual with a disability." It has been suggested that an applicant for a position must be fully qualified prior to applying for a position and that only after a job offer is made must a reasonable accommodation be made. This interpretation is belied, however, by the plain language of the regulations. Specifically, 29 C.F.R. section 1630.2(m) provides: "Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." Rules and Regulations, 56 Fed. Reg. 35735 (1991) (emphasis added).

In explaining this provision of the regulations, the EEOC has published a detailed section by section analysis of the ADA. This analysis indicates that "an individual with a disability is 'otherwise qualified' if he or she is qualified for the job except that, 'because of the disability,' the individual needs reasonable accommodation to perform the essential functions of the job." Rules and Regulations, 56 Fed. Reg. 35731 (1991). Further reading of the guidelines indicates that

the determination of whether an individual with a disability is "qualified" should be made in two

steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.

. . .

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers compensations costs.

Rules and Regulations, 56 Fed. Reg. 35743 (1991).

Exemptions from the reasonable accommodation provisions of ADA have been allowed where safety factors are a primary issue. "The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." Rules and Regulations, 56 Fed. Reg. 35738 (1991). However, "the safety defense has been given narrow scope; the employer must offer more than mere conclusions to present such a defense." *Ackerman v. Western Elec. Co., Inc.*, 860 F.2d 1514, 1519 (9th Cir. 1988).

As the court stated in *Mantolite v. Bolger*, 767 F.2d 1416 (9th Cir. 1985):

Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from work-related injuries

. . . . Allowing remote concerns to legitimize discrimination against the handicapped would vitiate the effectiveness of section 504 of the act.

"A mere 'elevated risk' standard is not sufficient to insure handicapped people's 'right to employment which complements their abilities.'" *Mantolite v. Bolger*, 767 F.2d at 1422.

Finally, the court in *Mantolite* said:

We agree with the court in *Black Ltd. v. Marshall*, 497 F. Supp. 1088 (1980) and with the court below to the extent it holds that, in some cases, a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.

Id. at 1422.

From the regulations and the applicable case law, it is clear that whether an applicant is a qualified individual with a disability for whom a reasonable accommodation must be made is a question that can only be answered by an individualized determination that must be specifically related to the particular job sought. Additionally, the determination must be made on the applicant's current ability to perform and not on speculative concerns about what may occur in the future. This does not imply that future events may never be a determining factor. Rather, it is an indication that decisions encompassing possible events in the future must be based upon solid, dependable facts rather than mere speculation.

The EEOC has also promulgated extensive Interpretive

Guidance for the ADA regulations. The Interpretive Guidance for the ADA regulations note that "Part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use job-related criteria to select qualified employees, and can continue to hire employees who can perform the essential functions of the job." Rules and Regulations, 56 Fed. Reg. 35746 (1991). The ADA is also not intended to require that employers lower their qualifications or standards for a job. Rather, the ADA ensures that qualified individuals with a disability are not denied employment unless they are unable to perform duties that are truly "essential functions" of the position.

Essential Functions

Following the previously cited two step analysis to determine whether an applicant is an otherwise qualified individual, the determination of what is and what is not an "essential function" is a key factor in making employment decisions for a specific job. Before beginning the analysis of the term "essential function," it is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. Rules and Regulations, 56 Fed. Reg. 35743 (1991). Keeping this preamble in mind, essential functions are defined by the regulations as follows:

- (1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
- (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
 - (i) The function may be essential because the reason the position exists is to perform that function;
 - (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Rules and Regulations, 56 Fed. Reg. 35735 (1991) (emphasis added).

There must be a necessary nexus between requirements and employment. *Pandazides v. Virginia Bd. of Educ.*, 946 F.2d 345, 349 (4th Cir. 1991). The courts in guiding employers in the determination of what is an "essential function" have said:

While legitimate physical qualifications may be essential to the performance of certain jobs, both that determination and the determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.

Hall v. U.S. Postal Service, 857 F.2d 1073, 1079 (6th Cir. 1988).

The Hall court went on to say:

¶ To the determination of whether physical qualifications are essential functions of a job requires the court to engage in a highly fact-specific inquiry. Such a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved.

Id. 1079.

Fact Specific Versus General Inquiries

The fact-specific inquiry required by the ADA is

demonstrated in the unpublished but well-reasoned district court case of *Kuntz v. City of New Haven*, 2 AD Cases 916 (1993). In *Kuntz* a police sergeant was denied a promotion to lieutenant because he had previously suffered a heart attack and subsequently had triple bypass surgery. *Kuntz* had been performing in an office job as a sergeant since his return to work. All personnel evaluations indicated *Kuntz* was performing necessary and important work in a highly satisfactory fashion. At trial, the New Haven Police Department ("NHPD") indicated it made no distinction, in terms of different requirements of different ranks, when considering whether a candidate is full duty. Essentially, the department's position was that all officers must be able to subdue a violent suspect and transfer to any position in the department. However, all individuals who testified for the department indicated that as an officer's rank increases, he or she is less likely to engage in physical exertion or stress. In reviewing the full duty concept in terms of "essential functions," as they were applied by the NHPD, the court noted: "With all deference to the higher-ranking NHPD officers who testified in court, . . . this judicial officer is not at all confident that any of them could accomplish themselves, if called upon, the task of apprehending a drug addict with a loaded gun in a dark alley at 3:00 a.m."

Citing the *Hall* case, the court found that a fact-specific inquiry revealed that Sergeant *Kuntz* could clearly perform the duties of a sergeant in the capacity he had previously filled and, in fact, while *Kuntz* was a sergeant he had already been performing many of the duties he would be called upon to perform as a lieutenant. Based upon its finding that full physical duty was not an "essential function" for all sergeant and lieutenant positions within the department, the Court ordered *Kuntz* reinstated and promoted to a lieutenant position that accommodated his physical requirements.

Further review of cases defining "essential functions" indicate that this term like "qualified individual with a disability," must be analyzed on a case by case basis, not on a general finding. Similarly, whether an accommodation can be reasonably made must also be made on a case by case basis.

A decision contrary to the *Kuntz* case was reached in the Eighth Circuit case of *Simon v. St. Louis County, Mo.*, 735 F.2d 1082 (8th Cir. 1984). In *Simon*, the police department argued that the appellant had not been discriminated against in violation of the Rehabilitation Act by arguing that he was not qualified for the position, "because he could not satisfy two police department requirements for commissioned officers - that

they be able to effect a forceful arrest and that they be able to transfer among all positions within the department." *Id.* at 1083.

In remanding the case to the district court for a determination of whether the noted qualifications were truly "essential functions," the circuit court gave direction to the district court that:

The district court should determine whether the ability to make a forceful arrest and the ability to perform all of the duties of all of the positions within the department are in fact uniformly required of all officers. If not uniformly required, they should not be considered actual requirements for all positions.

Simon v. St. Louis County, Mo., 735 F.2d at 1083.

Acting on the circuit court's instructions, the district court received evidence concerning the requirements. At the conclusion of the evidentiary presentation, the district court concluded that the requirements were reasonable, legitimate and necessary to guarantee effective police work and were uniformly applied to all officers. Based upon the evidentiary findings, the district court found that the police department's refusal to modify these requirements for the appellant was not unreasonable.

Significantly, in allowing the district court decision to stand, the circuit court did not indicate that it agreed with the district court findings. Rather, the circuit court said:

¶After carefully reviewing the record here we cannot say that the district court's findings that the forceful arrest and transfer requirements were in fact necessary to the job and uniformly applied were clearly erroneous. The district court dutifully followed the dictates of this court's mandate and based its findings on adequate evidentiary support. It is not our function to reevaluate the evidence and to substitute our judgment for the district court's.

Id. at 1085.

The *Simon* case would appear to indicate that "essential functions" may be determined on a department-wide basis. Note,

however, that the district court's direction indicates that for requirements to be considered truly department-wide functions they must be uniformly applied to withstand judicial scrutiny. Additionally, the Simon holding is at odds with other cases which discuss "essential functions." Our review of the cases which analyze the parameters of "essential function" indicates the great weight of authority follows the fact specific analysis discussed in Hall and Kuntz.

For example, in the Ninth Circuit case of *Bentivegna v. United States Dept of Labor*, 694 F.2d 619 (9th Cir. 1982) the circuit court reversed a lower court ruling and found that Bentivegna had been unlawfully terminated. The facts of the case involved a diabetic "building repairer" employed by the City of Los Angeles ("L.A.") who was terminated when L.A. physicians determined that one of Bentivegna's urine glucose tests raised the possibility of a future lack of control of his diabetic condition.

In reaching its decision that Bentivegna's termination was unlawful, the court noted that the Rehabilitation Act "provides that job qualifications . . . shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safety performance." *Id.* at 621. The court also said the City could not discriminate

by establishing restrictive "program requirements" where it could not so discriminate in making individual employment decisions, and that the Rehabilitation Act, taken as a whole, mandates significant accommodation for the capabilities and conditions of the handicapped. Blanket requirements must therefore be subject to the same rigorous scrutiny as any individual decision denying employment to a handicapped person.

Id. at 621.

The court's ruling rests squarely on the theory that "essential functions" must be demonstrably related to the job a particular individual seeks or performs and not to the jobs of the class as a whole.

A second Ninth Circuit case, *Ackerman v. Western Elec. Co. Inc.*, 860 F.2d 1514 (9th Cir. 1988) reaches a similar conclusion. In *Ackerman*, the appellant was terminated from her position as a

telecommunications installer because her bronchial condition required her to stay away from dust and heavy exercise. The district court conducted the type of fact specific inquiry outlined in Hall. In upholding the district court decision, the court noted that:

After reviewing evidence of the nature of crew arrangements and work assignments, the district court concluded that, while ironwork and cabling were essential functions of Index 2 installers as a group, they were not essential to any particular individual's performance of an installer's job. In light of the nature of Ackerman's past work, the district court concluded that such work was not an essential part of her job.

Id. at 1519.

These two cases, being Ninth Circuit cases, are binding on the City of San Diego. There are also illustrative of the analysis employed, almost without exception, by the circuit courts of appeal. The line of case law closely follows the dictates of the ADA regulations which state that "whether a particular function is essential is a factual determination that must be made on a case by case basis." Rules and Regulations, 56 Fed. Reg. 35743 (1991).

Work Force Size as a Factor in Determining Essential Functions

Another factor to be considered in making the determination of what is an "essential function" is the size of the work force. As indicated in 29 C.F.R. section 1630.2(n)(2)(ii), "the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed." Thus, in a city or town with a small department many functions might validly be determined to be "essential functions" because there is a legitimate job-related necessity for all employees to perform a full range of duties. However, as the size of a department increases, regardless of the type of department at issue, the necessity for each individual to perform all functions within the department decreases. Again, specific changes in duties can only be made on a case by case basis.

Although courts have indicated that class specifications are not binding, they are indicative of what may be considered

the essential functions of a job. For example, City class specifications indicate that police officers I, police officers II and police agents respond to disturbances and enforce the laws. These functions are the first functions listed under "typical tasks" in the class specifications. However, starting with police sergeant, and continuing up the promotional ladder, the main functions become supervision and training. This is not to indicate that an officer in the position of sergeant or above never effects an arrest. They may. This particular function, however, becomes less important and less frequently necessary as a part of the job and thereby becomes a marginal rather than "essential function." With respect to the City, this permutation of essential functions as one promotes in the same career track is consistently applied in all areas of the City's classified and unclassified services, from the fire department to the park and recreation department. The courts have indicated that the "employer bears the burden of persuasion to show legitimacy and necessity of requirements." *Simon v. St. Louis County, Mo.*, 735 F.2d at 1084. As there is substantial depth within each class in City service, the burden on the City to show that each member of a class, regardless of the class, must be able to perform, without exception, all the functions of the class is, for all practical purposes, insurmountable. For this reason, determinations of "essential functions" is best done on a case by case basis.

CONCLUSION

Based upon the Code of Federal Regulations interpreting the ADA, a qualified individual with a disability is an individual who can perform the "essential functions" of the job with or without a reasonable accommodation. Additionally, the Code and the majority of case law relevant to the issue of "essential functions," indicate the City must make the determination of what constitutes an "essential function" of a position on a case by case basis. Use of sweeping generalizations are acceptable only when defined by the job itself, as in requiring all clerk typists to be able to type. Given the legislative and legal history, the City can minimize this risk of liability if the determination of "essential functions" is done on a case by case basis.

If you have further questions, please contact me.

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